No. 86-328

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, CLC, AND ITS LOCAL 5-376,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. In actions to which the Civil Rights Attorney's Fee Act of 1976 applies, may the expert witness fees and expenses of prevailing plaintiffs be assessed against the defendants?

2. In view of the unchallenged finding of the trial court that this action under Title VII of the Civil Rights Act of 1964 was brought in good faith and not frivolous, unreasonable, or without foundation, is there any basis for assessing expert witness fees and expenses of the prevailing defendant against the plaintiffs?

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BRIEF FOR THE RESPONDENTS

STATUTES INVOLVED

28 U.S.C. § 1821(a)(1). Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.

28 U.S.C. § 1821(b). A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fees for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or any time during such attendance.

28 U.S.C. § 1920. A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

42 U.S.C. § 1988. In any action or proceeding to enforce [specified federal civil rights statutes including 42 U.S.C. § 1981] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-(k). In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Rule 54(d), FED. R. CIV. P. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .

STATEMENT OF THE CASE

In December, 1974, respondents International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376 ("IWA"), filed a charge with the Equal Employment Opportunity Commission alleging racially discriminatory employment practices by petitioner Champion International Corporation ("Champion") at its Oxford, Mississippi, particleboard plant. In February, 1978, the IWA filed suit in the United States District Court for the Northern District of Mississippi based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and 42 U.S.C. § 1981. Three individuals intervened as plaintiffs and were certified as representatives of a class of black employees at the Champion plant.

After trial of the liability stage, on September 10, 1982, the court issued an opinion and judgment dismissing the complaint and assessing costs against the IWA. *International Woodworkers of America v. Champion Intl. Corp.*, 30 EMPL. PRAC. DEC. (CCH) ¶ 33,287 (N.D. Miss. 1982), *affd.*, 732 F.2d 939 (5th Cir. 1984).

Champion thereuopn filed applications for costs totalling $38,072.20 ($31,333.87 for "Expert Witness Fees & Expenses") plus attorney's fees. In an order finding that "the record demonstrates that the lawsuit was brought in good faith and was neither frivolous, unreasonable nor without foundation," the court denied the application for attorney's fees based on *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and referred other costs questions to a magistrate. Order of December 30, 1982, No. WC-78-33-WK-P (N.D. Miss.).

Among various other costs rulings, the magistrate awarded Champion expert witness fees in a reduced amount of $11,807.16. Petition for Writ of Certiorari ("Petition"), Appendix D. On appeal by the IWA, the district judge held that the expert witness charges were

governed by the same standards as attorney's fees under *Christianburg*: none should be assessed because of his finding that the lawsuit had been brought in good faith, etc. Petition, App. C.

Champion appealed on the expert witness costs issue to the Court of Appeals for the Fifth Circuit; a panel affirmed in light of the unchallenged district court finding under the *Christianburg* test. Petition, App. B.

On *en banc* rehearing, the Fifth Circuit again affirmed but with completely different reasoning by an 11-4 majority. Relying primarily on the combination of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932), the court held that expert witness fees are not taxable costs *in any case* absent statutory authorization or application of one of the "three narrow equitable expectations recognized by *Alyeska*." Petition, App. A.

Civil rights cases are no exception, the court held, because the applicable attorney's fee-shifting statutes do not *expressly* mention expert witness costs. Petition, at A-11. Four concurring members disagreed with this aspect of the opinion, preferring the reasoning of the district court, the circuit panel, other circuits and the previous rule in the Fifth Circuit with respect to the expenses of civil rights plaintiffs. Petition, at A-14 to A-26.

SUMMARY OF ARGUMENT

Prevailing plaintffs in civil rights cases are entitled to be reimbursed for expert witness expense under the same standards as those applicable to their attorney's fees.

The decision of the court below includes a "direction" to the district courts within its jurisdiction to reject taxation of witness costs other than those specified by 28 U.S.C. § 1821. The direction clearly encompasses out-

of-pocket costs for prevailing plaintiffs in civil rights cases, heretofore recoverable as part of "attorney's fees" under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.

Respondent IWA would prevail in this case as to the expert witness expense of petitioner Champion under the theories of either the majority or the minority of the 11-4 *en banc* opinions below. However, the IWA has maintained an active legal program to enforce Title VII for fifteen years. Without the ability to collect its out-of-pocket expenses when it prevails, continuation of that effort as a "private attorney general" is in jeopardy.

Expert witness fees and expenses are large and vital expenditures for the effective presentation of Title VII class action claims. As a practical matter, if they are not taxed against losing defendant employers they must be assumed by the plaintiff lawyers. Thus for victims of discrimination general access to the courts and reasonable fee recovery for their attorneys are threatened.

The court below erred in concluding that there is insufficient indication of congressional intention to allow the recovery of out-of-pocket expenses including expert witness fees for prevailing civil rights plaintiffs.

Although the language of 42 U.S.C. §§ 1988 and 2000e-(k) is simple, its interpretation by this Court has been expanded in light of its history and purpose. *E.g.*, *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *See City of Riverside v. Rivera*, 106 S. Ct. 2686, 2695-97 (1986).

Senate and House reports included statements of intention that civil rights plaintiffs recover "what it costs them to vindicate these rights," that their attorneys be paid as is traditional for attorneys with fee-paying clients, that the concept of "private attorneys general" in the sense of *Newman v. Piggie Park Enterprises, Inc.*,

390 U.S. 400 (1968), was being adopted, and that fee diminution should not be permitted. The chief House sponsor stated on the floor that "the phrase 'attorney's fee' would include . . . all incidental and necessary expenses incurred in furnishing effective and competent representation."

The majority below relied primarily on *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), yet 42 U.S.C. § 1988 was enacted directly to counteract the effects of *Alyeska* on civil rights plaintiffs.

The understanding that Congress intended for the term "attorney's fee" in civil rights legislation to include out-of-pocket costs is held by every other circuit court of appeals. *E.g., Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188-92 (11th Cir. 1983). Moreover, the injection of this new problem into fee computations could require reexamination of the system developed by this Court in a series of cases. *E.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In view of the unchallenged finding of the district court that this action was brought in good faith and was not frivolous, unreasonable or unfounded, the expert witness expenses of Champion cannot be taxed against the IWA.

The district court found that this action met the *Christianburg* standards under which there is no fee-shifting in favor of a prevailing civil right defendant, and that finding has been unchallenged on appeal. Since Congress intended that out-of-pocket costs be considered within the concept of "attorney's fees," the result below must stand.

ARGUMENT

I. Prevailing plaintiffs in civil rights cases are entitled to be reimbursed for expert witness expense under the same standards as those applicable to their attorney's fees.

A. *The direction of the court below has devastating consequences for private enforcement of civil rights laws in the Fifth Circuit.*

The court below held:

> that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by [28 U.S.C.] § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow exceptions recognized by *Alyeska* [*Pipeline Service Co. v. Wilderness Society*] applies.

Petition, at A-12. Although the breadth of this rule was not necessary for disposition of the instant case, the announcement was more than dictum, as the court went on to say:

> We direct the district courts in the exercise of our supervisory power to apply the rule anounced today to all pending cases.

Ibid.

There can be no question that since June 2, 1986, prevailing plaintiffs in civil rights action in Fifth Circuit states have been unable to recover the expenses necessary for the prosecution of their cases which they would have been granted routinely under the previous circuit rule. *See Fairley v. Patterson*, 493 F.2d 598, 606, n. 11 (5th Cir. 1974); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981); *Berry v. McLemore*, 670 F.2d 30 (5th Cir.

1982). Application of the new general rule to civil rights cases was expressly confirmed by the majority, and was the subject of the concurrence. Petition, at A-11, A-13, A-14 and A-26.

Respondent IWA would not have to pay the $12,000 in issue under the view of any judge who passed on the case, from the district court through the appellate panel to both *en banc* opinions. But the IWA has an interest in this case which far overshadows its particular result. Primary concern must be focused on the new Fifth Circuit rule denying to *prevailing civil rights plaintiffs* the recovery of their out-of-pocket expenses. *See* Respondent's Brief in Opposition at 4-8.

The IWA has conducted a program for the enforcement of Title VII in the forest products industry for about fifteen years.[1] On the whole, it has been successful.[2] But without recovery of out-of-pocket expenses, the

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[1] For a history of the program *see* Youngdahl, *Equal Employment and Affirmative Action: the Union Role*, in PROCEEDINGS, N.Y.U. 27TH ANN. CONF. ON LABOR, at 163 (1974); Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 ARK. L. REV. 24, 32-38 (1984).

[2] *E.g., International Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977), *on remand, sub nom. Powell v. Georgia-Pacific Corp.*, 535 F.Supp. 713 (W.D. Ark. 1980, 1982); *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981), *on remand*, 34 EMPL. PRAC. DEC. (CCH) ¶ 34,324 (D.Md. 1984); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The EEOC issued its first statement on effects of union activity to enforce Title VII (LABOR RELATIONS YEARBOOK—1980, at 318 (BNA 1981)) based on an agency background paper which gave significant recognition to the IWA affirmative action program. 65 DAILY LABOR REPORT § D (Apr. 2, 1980). *See also* Hammerman & Rogoff, *How to Live with Title VII: An Opportunity for Unions*, 2 EMPLOYEE REL. L. J. 13 (1976); GOULD, BLACK WORKERS IN WHITE UNIONS 242 (1977).

financial stresses of the program would, at the very least, have seriously jeopardized its maintenance.[3]

In a sense the instant case illustrates the factual problem. The bill for the expert who testified for Champion exceeded $31,000. Comments of the district court indicate that the failure of the plaintiffs to hire an expert of their own[4] had a serious impact upon their chances of winning on the merits. *See International Woodworkers of America v. Champion Intl. Corp., supra*, 30 EMPL. PRAC. DEC. at 28,182 and 28,185 ("Plaintiffs offered no statistician to contradict [the Champion expert's] methodology or opinions. . . ."). The burden of carrying a $31,000 obligation for the thirteen years this case has lasted is serious enough. If, under the decision below, the plaintiffs could not recover such amounts in the situations where they finally prevail, it would be a clear impediment to continued service as a "private attorney general" in enforcing the laws against employment discrimination. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The concurring opinion makes two practical points which are not, and cannot be, disputed. First, expert

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[3] In *Chesapeake Bay, supra* note 2, for example, "expenses" were about fifteen percent of the total attorney recovery. 33 EMPL. PRAC. DEC. at 33,274. There is not an iota of record evidence that the IWA is a "large and powerful labor organization," as Champion asserts. Brief for Petitioner, at 11. In fact, the IWA is in the process of breaking up because, in large part, of its financial problems. *See* AFL-CIO News, Jan. 31, 1987, at 3, col. 2. Virtually by definition, unions have limited financial resources. *Compare IBEW v. Foust*, 442 U.S. 42, 50-51 (1979); *Vaca v. Sipes*, 386 U.S. 171, 197 (1967). The NAACP Legal Defense Fund, surely one of the largest litigators for civil rights plaintiffs, asserts that most "Title VII class actions require out-of-pocket expenditures of at least $100,000 in order to prepare and present them adequately." Brief of the NAACP Legal Defense and Education Fund, Inc., as *Amicus Curiae* in Support of the Grant of a Writ of Certiorari, at 10.

[4] The reason for the decision was primarily the high cost, even with the possibility of later recovery extant at the time.

witnesses are an "unavoidable necessity" in civil rights class actions in particular, and second, expert witness fees are a large part of the "staggering" costs of litigation. Petition, at A-34. For example:

> Statistics play a dominant role in virtually all adverse impact cases and disparate treatment class actions. Statistical proof is the very core of evidence in adverse impact cases because relevant assessments and comparisons must be expressed in numerical terms. In the disparate treatment class action case, statistics are generally utilized to establish the required pattern or practice of discrimination.

SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331 (2d ed. 1983). *See International Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977).

> The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys.

Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1190 (11th Cir. 1983).

Moreover, as a practical matter, the attorney for a class is responsible for the payment of an expert, and bears the risk of losing those costs in an unsuccessful action.[5] If that attorney is not allowed to collect the ex-

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[5] Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 695, n.72 (1986). The costs referred to here do not include, of course, "routine office overhead normally absorbed by the practicing attorney" and subsumed within the hourly attorney's fee. Dowdell v. City of Apopka, Florida, *supra*, 698 F.2d 1192. The distinction usually involves a determination of what expenses "a privately retained lawyer would bill to his client." Petition, at A-16. *See* Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 30 (D.C. Cir. 1984). Fees for the hours spent by law clerks were included in a "reasonable attorney's fee" without special comment in City of Riverside v. Rivera, 106 S.Ct. 2686, 2690 (1986).

pert witness expenses in a successful civil rights action, it will have a substantial impact on the ability to present civil rights claims because of diminished legal fees that result. *See Dowdell v. City of Apopka, Florida, supra*, 698 F.2d at 1190.

> As Congress recognized, fee shifting can be an "important tool" for ensuring the enforcement of constitutional guarantees. However, the tool is only effective when the award granted by the court covers the expenses of litigation and returns to the attorney a profit equivalent to that which he would have earned in his normal practice. To the extent that the statutory fee returns a lesser amount, lawyers will be economically discouraged from taking these cases.

Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act*, 80 COLUM. L. REV. 346, 372 (1980).

In sum, the challenged "direction" of the court below has consequences which are devastating to private enforcement of civil rights laws in the Fifth Circuit. In general, the litigation costs for successful plaintiffs have been increased markedly. In particular, the opportunity for attorneys willing to undertake such litigation to earn a reasonable fee has been diminished substantially.

B. *Congress intended that prevailing plaintiffs in civil rights cases be reimbursed for expert witness expense.*

The majority below found no congressional intention to allow reimbursement of expert witness expense to prevailing civil rights plaintiffs, and overruled a Fifth Circuit decision to the contrary as having relied upon "only a single sentence from a Senate report. . . ." Petition, at A-11. This conclusion frames the critical issue in this case,[6] and was clear error.

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[6] Concentration by respondent IWA on this issue illustrates its distinction from the issue in Crawford Fitting Co. v. J.T. Gibbons,

Demand by the court that intention to include expert witness fees be *express* in a congressional enactment is misplaced. *See* Petition, at A-9, A-13. With particular respect to civil rights attorney's fees statutes, this Court repeatedly has given broader and more complex meaning to simple words by drawing from the purpose and history of the legislation. *E.g., Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (standard for recovery of fees different for "prevailing party" plaintiffs and defendants); *Hutto v. Finney*, 437 U.S. 678, 697-702 (1978).

The legislative history of the 1964 Title VII attorney's fee provision, 42 U.S.C. § 2000e-(k), is "sparse." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). However, this Court repeatedly has looked to the history of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, "legislation similar in purpose and design to Title VII's fee provision," for indications of congressional intent. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71, n.9 (1980); *Hensley v. Eckerhart*, 461 U.S. 424, 434, n.7 (1983). Moreover, the instant complaint was also founded on 42 U.S.C. § 1981, and the challenged direction of the court below applies to all of the statutes within the ambit of the 1976 fee legislation.

Examination of the history of 42 U.S.C. § 1988 leaves no reasonable doubt that Congress intended the concept of "attorney's fees" to include expert witness costs and similar out-of-pocket expenditures.[7]

Inc., the consolidated case. IWA relies on particular statutory authorization for its positions, whereas respondent Gibbons argues that *in the absence of statutory authorization*, expert witness fees are not taxable.

[7] In a brief being filed simultaneously, *amicus curiae* NAACP Legal Defense and Education Fund, Inc., presents a meticulous examination of the legislative history of § 1988. Rather than repeating all of such material here, IWA adopts the *amicus* pre-

The manifest purpose of the 1976 enactment is most significant.

> Congress enacted § 1988 specifically because it found that that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market.

City of Riverside v. Rivera, 106 S.Ct. 2686, 2695 (1986).

> It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation *furthers this goal, while a contrary rule would force the complainant to bear the costs of* mandatory state and local proceedings *and thereby inhibit the enforcement of a meritorious discrimination claim.*

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) (Emphasis added.).

The Senate Report is difficult to misunderstand.

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court.

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910 (Emphasis added.). The "recover what it costs them" language was also used by Senator Tunney, an initial sponsor, on the Senate floor. 121 CONG. REC. S 14975 (daily ed. Aug. 1, 1975).

"In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compen-

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sentation and will deal here only with its highlights and broader connotations.

sated by a fee-paying client. . . ." S. REP. No. 94-1101, *supra*, at 6. "If the cost of private eforcement becomes too great, there will be no private enforcement." *Ibid.*

House action was consistent.

> Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts.

H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 1.

> The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.

Id. at 3. Representative Drinan, the author of this report and chief sponsor of the bill, explained authoritatively on the House floor:

> The language of [the bill] tracks the wording of attorneys fee provisions in other civil rights statutes such as section 706(k) of Title VII—employment—of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. . . . These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. *I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.*

122 CONG. REC. H 12159-60 (daily ed. Oct. 1, 1976) (Emphasis added.).

Again, in the words of "the original sponsor," Representative Seiberling:

> The meaning is very simple: when the cost of private enforcement actions becomes too great, there will be no private enforcement.

122 CONG. REC. H 12165 (daily ed., Oct. 1, 1976).

The "private attorney general" concept of *Newman v. Piggie Park Enterprises, Inc.*, *supra*, was central throughout. *E.g.*, S. REP. 94-1011, *supra*, at 3; H.R. REP. 94-1558, *supra*, at 6. Reports from both houses took pains to express the intention that the attorney's fees not be diminished by extraneous considerations. S. REP. 94-1011, *supra*, at 6; H.R. REP. 94-1558, *supra*, at 8-9.

Not only did the majority below ignore these compelling indications in the history of the 1976 legislation.[8] Its primary reliance was on *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), although enactment of 42 U.S.C. § 1988 was in *direct and immediate reaction to Alyeska* with respect to civil rights cases. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983); S. REP. No. 94-1011, *supra*, at 1; H.R. REP. No. 94-1558, *supra*, at 2-3. It is illogical for the court to have considered expert witness fees to be enough like attorney's fees to be controlled by the *Alyeska* reasoning, but not enough like them to be controlled by the congressional cancellation of that reasoning.

A significant aspect of the legislative history is its demonstration of congressional intention to reinstate pre-*Alyeska* case law on attorney's fee issues in civil rights cases. *E.g.*, S. REP. No. 94-1011, *supra*, at 4-6; H.R. REP. No. 94-1558, *supra*, at 6-9. One of the cases expressly

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[8] Prior to the issuance of the decision below, there was no indication that the court was taking up the question of expert witness fees for *prevailing* civil rights *plaintiffs*, unnecessary to resolution of the issues presented and decided up to then. Thus no opportunity to discuss the full legislative history was offered to the parties. *Amicus* NAACP Legal Defense Fund did submit an unsuccessful Motion for Reconsideration.

disapproved by *Alyseka* (421 U.S. at 272, n.46), but in effect reinstated by § 1988, was *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974), where one of the clearest early statements about out-of-pocket costs for prevailing civil rights plaintiffs appears:

> Court costs not subsumed under federal authority normally granting such costs against the adverse party, F.R.C.P. 54(d) . . . are to be included in the concept of attorney's fees.

493 F.2d at 608, n.11.

In sum, multiple indications of congressional intention, especially in the context of the history and larger purposes of the simple fee-shifting statement that constitutes the statute itself, compel reversal of the "direction" of the court below as to expert witness expense for prevailing civil rights plaintiffs.

C. *The direction of the court below is inconsistent with what has become an established judicial pattern for the reimbursement of prevailing plaintiffs in civil rights cases.*

As the concurring opinion demonstrates, prior to the decision below,

> no circuit has limited the award to litigation expenses incidental to attorney's fees under § 1988 to the costs enumerated in § 1920. None has found reason to treat expert witness fees as sui generis, and none has applied *Alyeska* in this context.

Petition, at A-23. Its all-circuit compendium, *id.*, at A-20 to A-23, requires little supplementation here.

The most thoughtful analysis appears in *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188-92 (11th Cir. 1983).

> The issue of which expenses are properly chargeable to the defendants under section 1988 . . . is governed by the purposes of the governing statute and the

> nature and context of the specific litigation. The purpose of the Attorney's Fees Awards Act is to ensure the effective enforcement of the civil rights laws, by making it financially feasible to litigate civil rights violations. Because civil rights litigants are often poor, and judicial remedies are often non-monetary, the Act shifts the costs of litigation from civil rights victim to civil rights violator.

698 F.2d at 1189 (Citations omitted). The two justifications for this "cost-shifting" apparent from the legislative history are access to the courts for the victims and incentive for "private attorneys general." "Because the Act is designed to translate policy into fact, the standard of reasonableness is governed by the economic realities of civil rights litigation." *Ibid.*

> Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. . . . If [all] these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.

698 F.2d at 1190.

The Seventh Circuit has been clear:

> [E]xpenses of litigation that are distinct from either statutory costs or the costs of the lawyer's time reflected in his hourly billing rates—expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals and expert witnesses—are part of the reasonable attorney's fee allowed by the Civil Rights Attorney's Fees Awards Act.

Heiar v. Crawford County, Wisconsin, 746 F.2d 1190, 1203 (7th Cir. 1984).

The analysis has not always been precisely the same, but the conclusions have been consistent.

> Even if a firm advances [the fees and costs of expert witnesses] in a contingent fee case, reimbursement from the client's recovery in addition to the attorney's contingent fee is usually expected. Therefore, if the district court concludes that expert testimony was reasonably necessary, it may reimburse reasonable expert witness fees under § 1988.

Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983). *See also Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 30 (D.C. Cir. 1984) (quoted in Petition at A-22 to A-23); *Daly v. Hill*, 790 F.2d 1071, 1082-84 (4th Cir. 1986) (reported after the circuit-by-circuit review included in the concurring opinion below).

But it is not just the unbroken line of courts of appeals' decisions with which the new Fifth Circuit majority clashes. This Court has developed an extensive body of law on the computation of fees under 42 U.S.C. §§ 1988 and 2000e-(k). *E.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *White v. New Hampshire Dept. Empl. Sec.*, 455 U.S. 445 (1982); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986); *North Carolina Dept. Transp. v. Crest St. Comm. Coun.*, 107 S. Ct. 336 (1986). *Hensley* and *City of Riverside*, in particular, dealt with the mechanics of fee determination.

The Fifth Circuit injects a brand new factor into these calculations. Should the "lodestar" rate be increased because the attorney had to pay for the expert witness fees for an impecunious client? Is enhancement to be more favored because of the increased contingency hazard in such circumstances? Questions of this kind can be answered, of course, but they increase the threat of "a second major litigation" which *Hensley* eschewed. 461 U.S. at 438.

Since June 2, 1986, there has been a large volume of civil rights cases pending in Fifth Circuit states, in all stages. In many of them, "private attorneys general," relying on the previous nationwide rule, had employed experts to perform vital services for their clients and the classes they represent. To tell such attorneys now that they, not the violators of law, are responsible for such previously incurred costs is, at least, shocking. That is what the decision below does; that is *not* what Congress intended.

II. In view of the unchallenged finding of the district court that this action was brought in good faith and was not frivolous, unreasonable or unfounded, the expert witness expenses of Champion cannot be taxed against the IWA.

There remains the particular question raised by petitioner Champion.[9] As a prevailing *defendant* in a civil rights action, is it entitled to reimbursement for its expert witness expense?

Every judge to pass on this question below answered in the negative. The district court, the circuit panel and the concurring *en banc* minority reasoned that since expert witness fees were included in the concept of attorney's fees under the civil rights fee-shifting statutes, they were controlled by the analysis of this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

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[9] Respondent IWA agrees with consolidated case respondent J.T. Gibbons, Inc., and the majority opinion below, that *absent independent statutory authority* federal district courts do not have the general power to award expert witness fees as part of the "costs." IWA makes no effort to address this broad point, however, because of its view that Congress *has* granted such authority in civil rights cases, and because it is being presented by Gibbons and affirmance of the particular result below would flow from either contention.

Under the continuing *Christianburg* standard, a defendant is entitled to fees as a "prevailing party" only if the action had been brought in bad faith, or if the claim was "frivolous, unreasonable, or groundless." 434 U.S. at 423. *See Hensley v. Eckerhart, supra,* 461 U.S. at 430, n.2.[10]

The district court dealt directly with the various prongs of this test in response to a Champion motion for an award of attorney's fees by "an express finding that the lawsuit was not brought in bad faith nor was it frivolous, unreasonable, or without foundation." Petition, at C-2. On subsequent consideration of the application for expert witness fees, the court applied the same test in reliance on prior consistent Fifth Circuit authority. *Id.*, at C-5 to C-7. Noting that the trial court finding was "unchallenged on appeal by Champion," the panel affirmed. *Id.*, at B-5.

Because of the same reasoning discussed in the first argument point, *supra,* IWA seeks affirmance of the *result* below. *See id.*, at A-26. Since Congress intended "attorney's fees" to include out-of-pocket costs in civil rights litigation, taxation of costs beyond those enumerated in 28 U.S.C. § 1920 must be controlled by the distinction between prevailing plaintiffs and prevailing defendants developed for awards of the basic attorney's fees themselves.

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[10] *See also* Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement,* 60 WASH. U.L. Q. 75 (1982).

CONCLUSION

The respondents ask that the court below be reversed as to its direction that prevailing plaintiffs in civil rights actions may not recover from the defendants their expert witness fees and expenses.

As to the result below, however, the respondents ask that the judgment of the court be affirmed.

Respectfully submitted,

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